



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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October 26, 2007

Rich McAllister
EPA Region 10, Mail Stop ORC 158
1200 Sixth Avenue
Seattle, WA 98101

RECEIVED
NOV - 2 2007
U.S. EPA REGION 10
OFFICE OF REGIONAL COUNSEL

RE: Swinomish Tribe's Treatment As State –USEPA Application

Dear Mr. McAllister:

The Swinomish Tribe has applied to the U.S. Environmental Protection Agency (EPA) for treatment in the same manner as a state for the purpose of water quality standards under Section 518 of the Federal Clean Water Act. The Swinomish Tribe seeks EPA approval to carry out Sections 303 (c), 401, and 518 of the Clean Water Act for all surface water within the exterior boundaries of the reservation. EPA Region 10 has requested comments from the State of Washington on EPA's proposed Findings of Fact on this application.

EPA's proposed Findings of Fact discusses the relationships between water quality and the beneficial uses of the Swinomish Tribe and potential threats to water quality. The Department of Ecology appreciates the Swinomish Tribe's deep connection to the land and water within its reservation and throughout its treaty area, and has no additional facts to add to this analysis.

For your consideration, I have attached printed email correspondence from Mr. Terry McNeil expressing concerns with this proposed delegation. I encourage you to respond to Mr. McNeil directly.

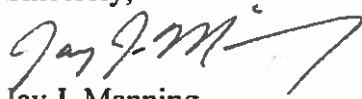
Ecology staff have found that the boundaries of the reservation identified in the proposed Findings of Facts do not match the boundaries in our state GIS layer for identifying impaired water bodies of the state. This GIS layer is used by other state agencies as well. We need more detailed information from EPA in order to update our information. My staff will contact you separately on this issue. Well delineated boundaries will help ensure clear communication in the future.



Rich McAllister
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With EPA and the Swinomish Tribe, we share the desire and responsibility to protect the beneficial uses of our shared waters for all of our citizens and for future generations. We are committed to respectful government-to-government relations with the Swinomish Tribe and recognize that intergovernmental partnerships can be effective tools for coordinating cross-border environmental programs. We look forward to continuing this constructive working relationship with the Swinomish Tribe and EPA to promote consistent and effective environmental protection of our shared water resources.

Sincerely,



Jay J. Manning
Director

Enclosures (3)

cc: The Honorable Brian Cladoosby, Swinomish Senate Chairperson
Jeannie Summerhays, Ecology NW Regional Director
Dave Peeler, Ecology Water Quality Program Manager
Tom Laurie, Ecology, Governmental Relations

Tavernor, Bernadette (ECY)

From: Manning, Jay (ECY)
Sent: Monday, October 08, 2007 8:32 PM
To: T McNeil
Cc: Peeler, Dave (ECY); Summerhays, Jeannie (ECY); Pastore, Dianne (ECY)
Subject: RE: TSTS is a really BAD idea

Thank you for your email Mr. McNeil. I am passing it on to Dave Peeler, who heads up our Water Quality Program and Jeannie Summerhays, who is our Regional Director for our Northwest Region, which includes your area. By copy of this email, I ask that they coordinate a response to your message. Jay

Jay J. Manning
 Director, Department of Ecology
 (360)407-7001

From: T McNeil [mailto:tmcneil@wavecable.com]
Sent: Monday, October 08, 2007 5:21 PM
To: Manning, Jay (ECY)
Subject: TSTS is a really BAD idea

If the Swinomish Tribe is accepted by the EPA for "treatment similar to states" for administration of the Clean Water Act section 303 Water Quality standards and section 401 certification Programs" there could be disastrous and unconstitutional consequences.

The Swinomish Tribe has less than one third of the land and less than one third of the residents within the confines of the original reservation. This action would allow a minority of people and land ownership to control the majority without any representation of the majority.

The U.S. Constitution guarantees a republican form of government. The U.S. Supreme Court has been consistently supportive of the rights of tribes to govern and tax tribal people and land, and equally supportive of the concept that tribes cannot govern or tax non-tribal people and non-tribal land except in two narrowly defined circumstances. Tribal government is not a republican form of government. It is whatever the tribal council decides it is. Non-tribal people have no vote or power over the tribal government. To subject non-tribal people to tribal law would do them a gross injustice and take away their constitutional rights.

It would allow the Swinomish Tribe to "adopt, review, and revise water quality standards pursuant to Section 303 (c) of the CWA and to certify that discharges comply with those water quality standards within the exterior boundaries of the Swinomish Reservation."

That means that the tribe can administer the Clean Water Act and "change" the standards. A state is allowed to administer the CWA as long as their standards are "the same or more stringent" than the federal standards. If the tribe is allowed to make the standards more stringent, they could threaten certain non-tribal industries with more stringent standards and punish them by actually changing them. Tribes could favor tribal enterprises by not enforcing standards or making exceptions for tribal members. Tribes regularly hide behind their so-called "sovereign immunity" and can not be sued in federal or state or county courts. Tribes are allowed to discriminate in favor "tribal members" with their laws and rules and do so regularly. There are no checks and balances or legal rights or constitutional rights for anyone when it comes to tribal actions, especially non-tribal residents of Skagit County.

*Addendum***Tavernor, Bernadette (ECY)**

From: Pastore, Dianne (ECY)
Sent: Thursday, October 11, 2007 8:50 AM
To: Tavernor, Bernadette (ECY)
Subject: FW: TSTS is a really BAD idea

B — [REDACTED] writes with further comments. Looks like we may have assigned this to WQ. Please forward this, as well. If possible, maybe they can respond to these comments in the same letter. See what can be done. Thanks!

From: [REDACTED]
Sent: Wednesday, October 10, 2007 9:50 PM
To: Manning, Jay (ECY)
Cc: Pastore, Dianne (ECY); Summerhays, Jeannie (ECY); Peeler, Dave (ECY)
Subject: Re: TSTS is a really BAD idea

Thank you Mr. Mannning for your response and referrals. I have a further comment after finding time to review the "Tribal Proposed Findings" at the library.

In reviewing the Swinomish Indian Tribal Community Proposed Findings of Fact it is apparent that the impressive twenty page findings, and the hundreds of pages of illustrations, verbiage, charts, studies, and other supportive evidence **is missing the point**.

The "tribal proposed findings of fact" are not targeted toward the second prong of the "Montana" test, which would rightly show real or imagined results of the proper constitutional interpretation of this EPA administration. The proper constitutional interpretation would imagine the tribe administering the federal CWA in regard to tribal land and people (and those who have a contractual agreement with the tribe to be governed by them). And Washington State would be serving the non-tribal people who vote in their government (state) support their government (state) with tax dollars and who deserve to be governed by their government (state), by administration of the federal CWA standard to non-tribal land and people.

The tribal message does not address this option, but rather addresses the possibility of harm to resources that might come if the tribe does not administer the CWA for non-tribal land and people, and **neither does anyone else**. That is not a valid argument.

The real of imagined results portrayed in the "tribal proposed findings" are not realistic expectations if Washington State administers the CWA for the non-tribal areas and people that they represent and rightly control. If the tribal administration is as worried about the environment and water as the "findings" document suggests, then their administration of the CWA among tribal people and land will not contribute to the degradation of the environment or water either.

To grant administration of the CWA over non-tribal land and people to a tribe is tantamount to declaring the State of Washington incompetent to administer federal law, and would be an affront to the U.S. Constitution and the U.S. Supreme Court who has required serious and substantial harm in order to invoke the second prong of the "Montana" test.

10/11/2007



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October 17, 2007

Mr. Terry McNeil
McNeil Excavating
16750 Warren Street
LaConner, WA 98257

Re: Swinomish Tribe's Treatment as State Application

Dear Mr. McNeil:

Thank you for your October 10, 2007, e-mail to the Department of Ecology's Director, Jay Manning. Mr. Manning asked that I respond on his behalf.

The Swinomish Tribe's application for Treatment of State is a federal process that is administered by the Environmental Protection Agency's regional administrator. Our region's administrator is Elin D. Miller, (206) 553-1234. The Water Quality Standards contact is Janine Jennings, (206) 553-2724.

There are eight tribes in Washington State that achieved the Treatment of State status with the federal Environmental Protection Agency. Each of these tribes adopted individual water quality standards that are different from the Washington State Water Quality Standards. Where the tribe's water quality standards are more stringent, and apply downstream of Washington waters, they sometimes have an impact on how we regulate in Washington. However, we found EPA and the tribes to be supportive of cooperative, coordinated, approaches to cross-border issues.

I appreciate the concerns you raise in your e-mail. As you may know, a number of these issues have been contested in the federal court system. The courts have strongly backed EPA's approach, including EPA's policy of promoting a unified water quality management system within Indian reservations. The issues you raised in your e-mails pertain to the relationship that the federal government has with federally recognized tribes in this country. I will forward your comments to EPA. Ultimately, the ability to grant a tribe Clean Water authority resides with the federal government and the state can only comment. When EPA makes its final decision, we will work with the Swinomish Tribe and the EPA to ensure that water quality programs and protections are in place for all citizens in a coordinated manner that minimizes boundary issues.

Thank you for your comments.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Peeler", is written over the word "Sincerely,".

David C. Peeler
Water Quality Program Manager

cc: Janine Jennings, EPA